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In The
Supreme Court of the United States

JAMAL KIYEMBA, *et al.*,
Petitioners,

v.

BARACK OBAMA, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONERS' REPLY BRIEF

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REPLY

1. In its Brief for the Respondents in Opposition ("Opp."), the Government does not contest that the issues presented by the Petition are both exceptionally important and recurring in a significant number of Guantánamo detainee cases.[1] In fact, after the Petition was filed, Justices Thomas and Scalia cited this case in particular as raising issues worthy of this Court's review in dissenting from a denial of certiorari. *See Noriega v. Pastrana*, No. 09-35, 2010 LEXIS 826, at *2 (U.S. Jan. 25, 2010) (Thomas, J., joined by Scalia, J., dissenting from denial of certiorari) (certiorari should have been granted since the Court "would provide much-needed guidance on two important issues with which the political branches and federal courts have struggled since we decided *Boumediene*") (citing, *inter alia*, *Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009) (*Kiyemba II*)).

The Executive's aim to close the Guantánamo facility has brought issues related to transfer to the forefront of detainee habeas litigation. Indeed, the Notice Orders at issue in the Petition are also at issue in more than one hundred detainee cases. The lower courts, which have jurisdiction over the detainees in question, need guidance from this Court as to the reach of *Boumediene* and *Munaf* with respect to the materiality of particular facts and circumstances of particularized transfers, and the appropriate level of deference to Executive policy in this area. *See F.T.C.*

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[1] Unless otherwise noted, all capitalized terms have the same meanings assigned to them in the Petition for Writ of Certiorari, dated November 10, 2009 ("Pet.").

v. Jantzen, 386 U.S. 228, 229 (1967) (certiorari granted, in part, "[i]n view of the pendency of almost 400 such orders" as the challenged orders); *United States v. Powell*, 330 U.S. 238, 240 (1947) ("The cases are here on petitions for certiorari which we granted because of the importance of determining the controlling principle for settlement of the many claims of this character against the Government."); *United States v. Standard Oil Co. of Cal.*, 332 U.S. 301, 302 n.2 (1947) (noting that certiorari was granted, in part, based on the petitioners' representation that approximately 450 claims raising the same question had been made).

2. In its opposition brief, the Government argues the merits of the Notice Orders principally by describing its specific efforts to relocate these Uighur Petitioners to safe third countries and reiterating its policy commitment not to return Petitioners to China, where it concedes they would be tortured. As an initial matter, the fact that the Government has not been impeded from making these relocation efforts itself demonstrates the lack of any harm to the Government from the Notice Orders. During the pendency of the certiorari petition in *Kiyemba v. Obama,* No. 08-1234 ("*Kiyemba I*"), ten Uighur detainees were transferred to Bermuda and Palau, in each case after notice to the detainees. In addition, the *Kiyemba II* Petitioners received advance notice of the proposed transfers described in the Government's brief. There is likewise no merit to the Government's claim that the Notice Orders would result in the disclosure of sensitive diplomatic discussion, since any proposed transfer can be filed under seal, by court order or agreement (in any event, all of the efforts described by the Government with respect to the Uighurs is now in the public

domain, which the Government does not claim impeded its efforts).

Fundamentally, the Government's focus on its relocation efforts for the Uighurs side-steps Petitioners' legal claim to notice of an imminent transfer, and ignores the fact that identical 30-day Notice Orders have been entered in cases involving over one hundred other detainees for whom the Uighur relocation efforts, and the Government's pronouncements, are inapplicable.

The Government notes repeatedly in its brief that its position that it will not return the Uighur Petitioners to China is a matter of policy or "commitment." *See* Opp. 2, 5, 7, 13, 18, 19, 20. However, the Government does not dispute that such policies and commitments are political in nature, and can be changed at the Executive's discretion. Like the Government's previous statements, the policy positions stated in the "new" Declaration of Daniel Fried submitted with the Government's brief, *see* Opp. at 5 n.1, are subject to unilateral reversal by the Executive. Indeed, the belated submission of the Fried Declaration illustrates the unpredictability of government policy: if the policy must be restated while a case is under consideration here, it affords no basis to reject out of hand the district court's conclusion that the court and Petitioners should be provided with notice of the Government's intent to effect an actual transfer.

The Government would leave all matters of transfer to the Executive Branch, even in cases involving non-enemy, non-combatant petitioners within a district court's jurisdiction. But this Court

has held that the Executive is not entitled to a "blank check" in the realm of detentions. *See, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion) ("[U]nless Congress acts to suspend it, the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining th[e] delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions.").

3. Petitioners argue that they are "entitled to notice and an opportunity to obtain judicial review of claims relating to their proposed transfer, if necessary, once the circumstances of the proposed transfer are known." Pet. at 26. Even accepting the Government's claims with respect to the Uighurs at face value, the Government intends to relocate many other detainees to their home countries *despite* their well-founded fears of torture or continued detention upon return. As Respondent explains, "[w]hen a person is released from military detention based on enemy status, the assumption is that he will be returned to his country of citizenship." Opp. at 7. For many detainees—not only the Uighurs—the "country of citizenship" is a location where the individuals fear they will likely be tortured or subject to further detention. The Court's guidance on the validity of Petitioners' claims is necessary in part because there are other cases affected by *Kiyemba II*. If the Court declines to hear Petitioners' claims, permitting the Government to transfer detainees without notice in this and other cases, the Government may evade review of its policy altogether.

As explained in the *amicus* brief filed by various Guantánamo detainees, several district court judges issued Notice Orders (or their equivalent) to create a

mechanism to ensure that a detainee's counsel would have an opportunity to forestall the detainee's transfer to his home country where the detainee had reason to fear that he would be tortured or subject to continued detention. *See* Br. of Guantánamo Detainees, Umar Hamzayevich Abdulayev And Other Guantánamo Detainees, As *Amici Curiae* In Support Of Petitioners at 5, dated Dec. 15, 2009 ("Amicus"). The Court of Appeals' decision places many of these detainees at risk, a risk not mitigated by the Government's express desire not to transfer Uighurs to China. Indeed, the situation of many of these detainees highlights the need for these Notice Orders and the recurring significance of the questions presented by the Petition. We respectfully refer the Court to the Amicus, which describes in further detail other cases where the 30-day Notice Orders or other orders affected by *Kiyemba II* are necessitated based on a current fear that the Government will transfer habeas petitioners to a country where they are more likely than not to be tortured or unlawfully detained.

The D.C. Circuit's conclusion that *Munaf* supports the decision below is an odd one, for the *Munaf* petitioners had the very thing Petitioners seek to preserve here: *notice* of the intended transfer. The Court there did precisely what we submit would happen here: it reviewed the facts and circumstances of the proposed transfer, and considered whether anything in law precluded transfer. Finding that transfer was planned to a sovereign ally for prosecution of crimes allegedly committed within that sovereign's territory, this Court found no basis in habeas to enjoin the transfer. Other cases, involving other sovereigns, and other facts, may—or may not—lead to other answers.

4. The Government concedes that Petitioners preserved the argument that they are entitled to the Notice Orders based on the claim that they will potentially be tortured after a transfer out of Guantánamo, but asserts that Petitioners failed to preserve the argument that the Notice Orders are also necessary to prevent transfer for continued detention. Opp. at 24. However, Petitioners squarely raised both claims below. *See, e .g.*, Suppl. Br. for Appellees, at 5, *Kiyemba v. Bush*, No. 05-5487 (D.C. Cir. Aug. 21, 2008) ("Appellees Suppl. Br.") (petitioners arguing for habeas claims against transfer that would result in "their continued unlawful detention in a location beyond the jurisdiction of the district court . . . *at the hands of, in coordination with, or at the behest of the United States*") (emphasis added); *see also id.* ("Petitioners assert further that any proposed transfer that would unlawfully subject them to risk of physical harm or *continued unlawful detention* would be patently illegal and clearly within the purview of the district court to prevent.") (emphasis added); Suppl. Response Br. for Appellees at 8, *Kiyemba v. Bush*, No. 05-5487 (D.C. Cir. Sept. 4, 2008) ("Appellees' Suppl. Response Br.") ("claims opposing unlawful transfer—whether designed to unilaterally defeat the court's habeas jurisdiction or *to result in continued unlawful detention* or physical harm to the petitioner—sound in habeas") (emphasis added); *id.* ("Any inconvenience purportedly suffered by Respondents by providing notice of transfer is outweighed by the harm Petitioners would suffer if unilaterally transferred to a foreign country *for unlawful detention* or torture.") (emphasis added).

Like the prior policy statements by the Government, the Fried Declaration conspicuously does

not commit to even a general policy to not transfer Petitioners and other detainees for further detention. *See, e.g.*, Fried Decl. ¶ 3 (stating policy that "U.S. government will not transfer individuals to countries where it has determined that they are more likely than not to be *tortured*," but not mentioning transfer for continued detention) (emphasis added).[2] As Petitioners previously submitted, and as Judge Griffith concluded, Petitioners are entitled to notice and an opportunity to be heard on a claim that a proposed transfer would actually result in "their continued unlawful detention in a location beyond the jurisdiction of the district court, whether at the hands of a foreign government or at the hands of, in coordination with, or at the behest of the United States." *See, e .g.*, Appellees' Suppl. Br. at 5; App. 32a (Griffith, J., dissenting and concurring) ("When an individual entitled to habeas protections faces the prospect of continued detention—be it by the United States at Guantanamo Bay or on its behalf after transfer to a foreign nation—he must be afforded some opportunity to challenge the government's case.").

Asserting that this argument was not preserved, the Government seizes on Judge Kavanaugh's concurrence below, which stated that Petitioners' claim with respect to transfer for further detention "at the behest of the United States" was only an "ambiguous" reference to a claim against "continued

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[2] In addition, Petitioners respectfully refer the Court to additional documents that are being submitted herewith under separate cover letter. *See* Letter of Melissa J. Durkee, dated February 25, 2010. Because the Government asserts that these documents contain certain classified information, they are being submitted under seal.

detention 'on behalf of the United States.'" App. 23a. This assertion is inconsistent with the record. *See, e.g.*, Appellees' Suppl. Br. at 5 (emphasis added); Appellees' Suppl. Response Br. at 8; *Cf. MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 125 (2007) ("That petitioner limited its contract argument to a few pages of its appellate brief does not suggest a waiver . . . ."). In any event, Judge Griffith's concurrence and dissent recognized that Petitioners raised this claim and were entitled to the Notice Orders based upon it, App. 29a-35a, which is more than sufficient basis for this Court to review the argument. *See, e.g.*, *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 122 (2001) (Scalia, J., concurring) ("[T]he Court of Appeals apparently decided that the particular . . . challenge brought by petitioners had been preserved, because it addressed the argument on the merits.").

Moreover, despite the Court's general (though not absolute) rule disfavoring the consideration of new *issues* on appeal, there is no limitation on the consideration of a new *argument*. *See PGA Tour, Inc. v. Martin*, 532 U.S. 661, 677 (2001); *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). Whether the Notice Orders are justified by the need to protect against transfer to torture—which is indisputably preserved—or transfer to continued detention is a difference of arguments, not issues. The relief requested and the question presented is the same, and in each case raises the fundamental point of whether the district court having jurisdiction should have some opportunity to consider whether the particularized facts of the case raise a basis to question the transfer of a petitioner out of the Court's jurisdiction. *See also Nixon v. Fitzgerald*, 457 U.S. 731, 743 n.23 (1982) (holding that Court may consider

"pure issue of law" even though not raised below); *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) (same).

5. The Government argues that *Munaf* has settled the question whether an All Writs Act injunction requires satisfaction of the four-part standard for traditional preliminary injunctions. Opp. at 26. *Munaf* does not mention the All Writs Act at all—let alone discuss its application. The argument that this Court settled the question of the Act's applicability without mentioning the Act itself is, to the say the least, implausible. "Questions which merely lurk in the record . . . are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925).

The Government does not dispute that the D.C. Circuit's decision below, equating an All Writs Act injunction with a Rule 65 injunction, conflicts with *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092 (11th Cir. 2004). Instead, it cites *Alabama v. United States Army Corps of Engineers*, 424 F.3d 1117, 1131-32 n.20 (11th Cir. 2005), to contend that there is a split within the Eleventh Circuit on the issue. This only demonstrates the need for this Court to resolve an All Writs Act issue that is already subject to a well-developed circuit split. *See Inyo County, Cal. v. Paiute-Shoshone Indians*, 538 U.S. 701, 710 n.5 (2003) (certiorari granted to address question on which the Ninth Circuit "expressed divergent views"); *Comm'r v. Estate of Bosch*, 387 U.S. 456, 457 (1967). Moreover, the Government offers no grounds to reconcile the D.C. Circuit's decision here with *In re Johns-Manville Corp.*, 27 F.3d 48 (2d Cir. 1994), other than to say that the Second Circuit's decision should be limited to its facts. Opp. at 27-28. The critical point is that the

Second Circuit ruled *as a matter of law* that the movant need not meet the traditional Rule 65 factors in obtaining an All Writs Act injunction, which is directly at odds with the D.C. Circuit's decision here. This Court should grant certiorari here to harmonize the law of the lower courts.

6. For the reasons explained, the questions here are undoubtedly worthy of immediate review. Moreover, *Kiyemba II* affords the Court the opportunity to address certain important questions that would otherwise have been addressed in the recently remanded *Kiyemba I*, and which remain both exceptionally important and recurring in a significant number of Guantánamo detainee cases. *See* No. 08-1234, Slip Op. dated March 1, 2010 ("Slip Op."). For example, in *Kiyemba I*, Petitioners asserted, following the rationale of extra-territorial application of the Constitution set out in *Boumediene*, that the Due Process Clause of the Fifth Amendment runs to Guantánamo and affords them a release remedy.[3] Petitioners also assert in this case that habeas courts have the authority under the Due Process Clause to provide Petitioners with notice and a hearing, so that they may raise any legitimate concerns they may have with a proposed transfer before it is a *fait accompli*. *Kiyemba I* was remanded because of the factual development that the petitioners had recently been offered resettlement in countries other than the United States. Slip Op. at 1. While that factual

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[3] The Brief for the Respondents in *Kiyemba I* (at 42-44) did not contest that the Due Process Clause is in effect at Guantánamo (although the Government contended that it did not afford the relief sought there).

development is also common to Petitioners here, it does not impact the questions presented in the petition, which relate to the judicial *habeas* authority to require 30-days' notice prior to any intended transfer.

Alternatively, if the Court believes that recent factual developments such as the resettlement offers or the Government's recent submission of the Fried Declaration are relevant to the questions presented, Petitioners respectfully submit that the Court of Appeals' decision should, consistent with this Court's recent ruling in *Kiyemba I*, be vacated and remanded to determine whether further proceedings in the district courts are necessary and appropriate for disposition of this case. *See* Slip Op. at 1-2.

CONCLUSION

For the foregoing reasons, and those previously submitted, the Court should grant the petition for a writ of certiorari or, alternatively, vacate the Court of Appeals' decision and remand to determine whether further proceedings in the district courts are necessary and appropriate.

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